No. 56301-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.
GORDON ROBERT HAMMOCK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Andrew Toynbee, Judge
Cause No. 07-1-00066-1

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent
2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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2. Whether the trial court properly imposed community custody supervision fees where the fees are not costs as defined by RCW 10.01.160.

3. Whether the trial court abused its discretion by denying Hammock's request for appointment of an expert on diminished capacity for resentencing where Hammock made no showing that such an expert was necessary and the record demonstrated that such an expert had been available to the defense prior to trial.

4. Whether Hammock preserved a request for substitute counsel for appeal and if so, whether the trial court properly responded based on the record before the trial which did not demonstrate good cause for substitution of counsel.

5. Whether the trial court properly responded to Hammock's concern that his trial counsel was providing

ineffective assistance of counsel where Hammock failed to demonstrate either deficient performance or prejudice.

6. Whether the appearance of fairness doctrine requires a different trial judge if this matter is remanded where there was no showing of actual or potential bias and the record demonstrates that all parties received a fair and neutral hearing.

B. STATEMENT OF THE CASE

The appellant, Gordon Robert Hammock, was convicted of Murder in the First Degree, Unlawful Possession of a Firearm in the First Degree, Possession of a Controlled Substance, Attempted Intimidating a Witness, and Unlawful Use of Drug Paraphernalia following a jury trial that occurred in 2008. CP 72-83. This Court affirmed his convictions and sentence. State v. Hammock, 154 Wn. App. 630, 226 P.3d 154 (2010), *review denied*, 169 Wn.2d 1013, 236 P.3d 206 (2010).[1]

[1] A copy of this Court's decision was attached to the State's Resentencing Memorandum and appears at CP 62-70.

This Court summarized the facts of Hammock's trial as follows:

> After an extended period of using drugs and arguing with William Ford, Hammock handed his girl friend, (sic) Melissa McKee, a .22 caliber bullet, a hollowed-out bolt with a hexagonal head, and a ball peen hammer, and told her to shoot Ford. Hammock had previously used the device to discharge a bullet. Hammock inserted the shell into the head end of the bolt. McKee placed the nonhead end of the bolt against Ford's head, struck the bullet with a ball peen hammer, and discharged the bullet into Ford's head. Ford did not die immediately. About 20 minutes later, Hammock jumped over the bed without warning and repeatedly hit Ford in the head with a hammer. Ford remained conscious for several more hours. Later Hammock exited the room and returned with a metal object similar to a meat cleaver and struck Ford in the head two or three times. Ford remained alive and conscious, so Hammock knotted an extension cord around Ford's neck and placed a white plastic bag over Ford's head. Hammock also struck Ford again with the metal object once or twice. Ford ultimately died from a gunshot wound to the head, blunt force impacts to the head, and ligature strangulation due to an extension cord around his neck.

Id. at 633-634.

The trial court imposed a sentence at the high end of the standard range of 596 months. CP 90. Following the unprecedented decision of our Supreme Court in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021), the matter was brought back before the Superior Court for resentencing without inclusion of the possession of a controlled substance conviction in the offender score. The State filed a resentencing memorandum which detailed Hammock's criminal history and included judgment and sentences for Hammock's criminal history which had been previously filed at the original sentencing hearing. CP 98-134.

At the initial resentencing hearing, the prosecutor noted that the offender score on the murder in the first-degree charge would go from a score of 9 to a score of 8 due to the effect of Blake. RP 3-4. The trial court questioned whether two possession of stolen property offenses from a prior Thurston County cause number counted as the same criminal conduct, noting that it appeared that the parties had reached an

agreement in that case, that the offenses counted against each other. RP 4. The judgment and sentence for that offense was included in the State's resentencing memorandum and showed that the Thurston County Superior Court had scored the original offenses against each other in calculating the offender score following Hammock's plea. CP 117-125.

The prosecutor noted that when Hammock was originally sentenced in this case, the possession of stolen property charges were counted as one point, and based on that understanding, the State had counted the two offenses as one point for purposes of resentencing. RP 4-5. The prosecutor suggested that a continuance might be prudent so that the State could discuss the issue with Mr. Hammock's counsel, Mr. Blair. RP 5. Mr. Blair noted that he had spoken with Mr. Hammock a number of times and that Mr. Hammock believed the Thurston County charges had been counted as "same course of conduct." RP 5. Mr. Blair also noted that the original sentencing court in this case had counted the two offenses as one point. RP 5-6.

The trial court acknowledged that the original sentencing judge had treated the Thurston County charges as one point but indicated that the parties could do more research into that issue. RP 6-7. At that point, Mr. Blair indicated that Hammock wanted him to set over sentencing to request to have the court appoint an expert to argue diminished capacity at the time of the offense. Blair noted that there had been some argument about that at the time of trial. RP 7. The prosecutor noted that the trial occurred 13 years ago and indicated that diminished capacity would normally be addressed prior to trial. RP 7. The prosecutor noted,

> I don't see the diminished capacity report would actually have much bearing given if it was addressed at the original sentencing, I did not see that reflected in the paperwork that I had - - that I have access to currently. And, frankly, the matter has been before the Court of Appeals already so I'm not sure that this particular proceeding should reopen all those issues.

RP 8.

At that point, the trial court continued the matter to allow the parties to consider whether the Thurston County stolen property charges should count as one point or two. RP 8. With regard to diminished capacity, the trial court noted,

> As far as diminished capacity, that's a defense, it's a trial defense. It was not pursued at trial. It may or may not have been explored but it was not pursued at trial. The trial ended, the verdicts came back. The verdicts are sound; there's nothing that validly attacks the verdicts and the judgment has been final for over 10 years. So I'm not going to reopen a trial issue. And I'm not finding that there's been any offer of proof or anything in the record that would indicate that is an appropriate sentencing issue. So I'm denying the request to appoint an expert.

RP 8-9. The trial court indicated that Mr. Hammock could explore that further but there was no factual basis to appoint an expert. RP 9.

Prior to the next hearing, Hammock sent a letter addressed directly to the trial court indicating that he believed Mr. Blair was providing ineffective assistance of counsel. CP 238-239. The trial court addressed the letter at the start of the

hearing, indicating that copies were provided to Mr. Blair and to the prosecutor. RP 12. The trial court noted, "This issue was raised before and I ruled on that motion, but I think a little more of a record is appropriate under the circumstances for Mr. Hammock's benefit and the benefit of this record." RP 12-13.

The trial court then noted,

> This is a resentencing based on an offender score change due to State versus Blake. The scope of the representation of Mr. Blair is resentencing in light of this change in the law. And this doesn't open it up to any resentencing on any issue, especially those issues that could have been brough at the time of the original sentencing. There was a direct appeal of the case and the judgment became final several years ago after that direct appeal.
>
> Mr. Hammock is wanting this court to utilize this opportunity for him to pursue a defense for a sentencing factor that he did not pursue before the judgment became final. Again, I ruled previously that the record does not support the court appointing such an expert. And the possibility of a diminished capacity defense was initially raised in the omnibus hearing, And (sic) the omnibus order was filed before trial.

RP 13-14.

The trial court continued to summarize the record of proceedings prior to trial stating,

> Based on that the State moved for a forensic examination and Mr. Hammock was evaluated for diminished capacity by Western State Hospital. According to the January 8th, 2008 report, the doctors who examined Mr. Hammock wrote a 23-page report detailed (sic) their process and their findings and determined that he had the capacity to form the requisite intent for the crimes he was eventually tried for.
>
> Prior to that report being written Mr. Blair moved for the appointment of an expert. Although the defense didn't explicitly state the exact reason for hiring the expert, the expert, Dr. Hall's 14-page curriculum vitae establishes that he's a forensic neuropsychologist and professor with expertise in the effects of methamphetamine on criminal behavior and criminal intent. The file also details that he was paid for the services. So the rational conclusion is that he provided services, including an opinion, and it was not favorable or was considered in light of the potential diminished capacity defense and was rejected.

RP 13-14. *See also*, Report- Mental Health Evaluation (01/15/2008), Supp CP 116; Motion for Expert Witness (12/18/2007), Supp CP 98. The trial court reiterated, "There's no basis in the record that I'm aware of that would support such

a defense or a mitigating factor such that the Court would appoint an expert to explore it." RP 14. The trial court then noted,

> Mr. Blair did advocate for the court to appoint an expert as requested by Mr. Hammock. The lack of an offer of proof is not deficient performance by Mr. Blair, he's simply aware of the evidence surrounding the issues of diminished capacity based upon the handling of the case before the trial.

RP 15.

The prosecutor indicated that both he and Mr. Blair had followed up on the Thurston County stolen property charges and based on the trial court's prior ruling and everything that the prosecutor had seen during the follow up, the State was not asking the trial court to reconsider the ruling of the original trial court counting those two offenses as one point. RP 16. The parties agreed that the correct offender score was 8 for the murder in the first-degree following Blake. RP 16-17, 19. The prosecutor noted that the jury had found an aggravating factor at trial and asked the trial court to consider imposing the same

sentence that the original trial court believed was appropriate. RP 16-17.

Mr. Blair indicated that he had spoken with the original prosecutor and recalled that the original prosecutor had asked for 1,200 months and the original trial judge sentenced Hammock at the high end of the range. RP 19. Mr. Blair indicated that he has spoken to Mr. Hammock about the Thurston County stolen property cases and the concern was resolved because the two charges were only being counted as one point. RP 19-20. Mr. Blair then indicated that the trial court should do the same as the original trial court and impose the high end, but that the high end sentence would be with an offender score of 8 instead of 9. RP 20.

Hammock indicated that he did not believe that an exceptional sentence was appropriate. RP 20-21. The trial court noted that the jury had made a finding of an aggravating factor but elected to impose the high end of the standard range for a total sentence of 541 months. RP 21-22. The trial court

deleted the $1,000 VUCSA fee that had been imposed in the original judgment and sentence as well as the $100 DNA fee, and reimposed the previously ordered restitution amount. RP 22. The trial court then made specific findings before reimposing attorney's fees that had been previously ordered. RP 22.

The trial court noted,

> In my discretion I'm going to find that Mr. Hammock does have the ability to pay the legal financial obligations for the attorney fees. And that is because he's in good health, he will have opportunities in custody to earn money and the money that he earns on his books can and should go towards the attorney fees.
>
> He's free to challenge anything that's left once he's released and wants to bring a motion, he's free to challenge any action to, I guess, police the selection of those attorney fees after he's released. But he does have the ability to earn money while he's in custody even though it's a limited amount and pay towards the attorney fees. So I'll leave those as previously imposed.

RP 22-23. This appeal follows the resentencing hearing.

C. ARGUMENT

1. The State concedes that the trial court's inquiry regarding Hammock's ability to pay discretionary legal financial obligations was insufficient to support the imposition of attorney fees.

RCW 10.01.160(1) states that a sentencing court "*may* require the defendant to pay *costs*." (emphasis added). Court-appointed attorney fees constitute costs. In re Pers. Restraint of Dove, 196 Wn. App. 148, 155, 381 P.3d 1280 (2016). The trial court has discretion whether to impose costs under that statute. *See* State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992) (holding that the imposition of costs is within the sentencing court's discretion). However, "a court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)." RCW 10.01.160(3).

A review of a trial court's compliance with an individualized inquiry of a defendant's ability to pay LFOs is reviewed de novo. State v. Ramirez, 191 Wn.2d 732, 741, 426 P.3d 714 (2018).

In State v. Blazina, the Washington Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations there must be an individualized determination of a defendant's ability to pay. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of former RCW 10.01.160(3), which stated,

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Blazina, 182 Wn.2d at 837-38; *see also* Laws of 2007, ch. 367, § 3. Therefore, to comply with Blazina, a trial court needed to engage in an inquiry with a defendant regarding his or her individual financial circumstances, including present and future ability to pay LFOs. *Id*.

In Ramirez, the Washington Supreme Court noted that, despite its ruling in Blazina, the trial courts were often

imposing costs with very little discussion. Ramirez, at 739. The Ramirez court set forth a number of considerations the trial court should consider when determining a defendant's present and future ability to pay LFOs. *Id.* at 742. The Washington Supreme Court, "specifically instructed courts to look for additional guidance in the comment to court rule GR 34, which lists the ways a person may prove indigent status for the purpose of seeking a waiver of filing fees and surcharges." *Id.* The Ramirez Court also instructed trial courts to consider a defendant's debts and incarceration as potential factors impeding a person's ability to pay LFOs. *Id.*

A person is indigent under RCW 10.101.010(3)(a) through (c) if he or she receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual after-tax income of 125 percent or less of the current federally established poverty level. Here, the trial court noted that Hammock is in good health and able to

earn money while incarcerated but did not engage in a full colloquy as required by Blazina and Ramirez.

The record must reflect that the trial court inquired into the mandatory Blazina factors and other "important factors" before deciding to impose discretionary costs. *Id.* at 750. *See* State v. Workman, No. 55908-1-II, 2022 WL 1091701 *1 (Div. II) (remanding for the trial court to reconsider imposition of attorney fees as an LFO after inquiring into Workman's ability to pay).[2]

Here, while the trial court made specific findings regarding the limited ability of Hammock to earn money while incarcerated, the State concedes that inquiry was not in compliance with Blazina and Ramirez. Therefore, the State concedes that this Court should remand to conduct an individualized inquiry on the record about Hammock's current

[2] Unpublished Opinion offered for whatever value the Court deems necessary under GR 14.1.

and future ability to pay before imposing discretionary attorney fees.

Alternatively, Hammock argues that simply because the court ruled him indigent for purposes of receiving court-appointed counsel, that the court may not impose attorney fees. RP 14. However, the fact that Hammock was indigent relating to his ability to afford appellate counsel under RCW 10.101.010(3)(d) does not demonstrate that Hammock was indigent under RCW 10.101.010(3)(a) through (c). *See* State v. Gouley, 19 Wn. App. 2d 185, 207, 494 P.3d 458, 470 (2021), *review denied*, 198 Wn.2d 1041, 502 P.3d 854 (2022) (remanding to the trial court to determine whether Gouley was indigent under RCW 10.101.010(3)(a) through (c)). The fact that the trial court found that Hammock was indigent for purposes of appeal does not conclusively end the inquiry regarding Hammock's ability to pay.

If after an additional inquiry, the trial court finds that Hammock is indigent under RCW 10.101.010(3)(a) through (c),

the proper remedy would be to strike the attorneys fees that were ordered by the court. Any remand should be limited to consideration of the imposition of discretionary legal financial obligations.

2. Community Custody Supervision Fees are not costs and are within the discretion of the trial court to impose.

As a defendant's indigency status is inapplicable to the imposition of discretionary Community Custody Supervision Fees, the court's judgment should be affirmed. Community Custody Supervision Fees are discretionary LFOs because they are waivable by the court. State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020), *review denied*, 195 Wn.2d 1022, 464 P.3d 198 (2020). However, the fact that Community Custody Supervision Fees are discretionary LFOs does not mean that they are costs. State v. Spaulding, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020). The supervision fee is not a "cost" under RCW 10.01.160(3) as it is not an expense specially incurred by the State to prosecute the defendant, to

administer a deferred prosecution program, or to administer pretrial supervision. Spaulding, at 536 (holding RCW 10.01.160(3) does not prohibit the imposition of supervision costs on an indigent defendant). Instead, Community Custody Supervision Fees are intended to cover post-conviction costs that will be incurred at a later date to help fund the Department of Corrections. State v. Starr, 16 Wn. App. 2d 106, 109, 479 P.3d 1209 (2021). As Community Custody Supervision Fees are a waivable condition imposed in the sentence and not a cost, the sentencing court did not err when it imposed these fees.

Hammock's argument that 2SHB 1818 removed eliminated Community Custody Fees ignores the fact that the legislation amending RCW 9.94A.703 was not signed into law and effective until June 9. 2022. *Laws of 2022*, Ch. 29, 2SHB 1818. *Laws of 2020,* ch.7, as cited to by Hammock, contains Engrosses House Bill 2965 dealing with the Novel Coronavirus. At the time of resentencing, the trial court had authority to

impose the Community Custody Supervision Fees and the record is clear that the trial court intended to impose the fee.

3. The trial court did not abuse its discretion by denying Hammock's request to appoint an expert witness on diminished capacity.

A defendant's constitutional right to the assistance of an expert witness is no broader than their right to petition for state paid services under CrR 3.1(f). State v. Mines, 35 Wn. App. 932, 935, 671 P.2d 273 (1983), *review denied* 101 Wn.2d 1010 (1984). CrR 3.1(f) allows for the appointment of an expert at State expense when the services are "necessary", and the defendant is financially unable to pay for them. CrR 3.1(f)(2). The determination of whether expert services are necessary for an indigent defendant's adequate defense is within the trial court's discretion. State v. Heffner, 126 Wn. App. 803, 809, 110 P.3d 219 (2005); *citing*, State v. Hermanson, 65 Wn. App. 450, 425-53, 829 P.2d 193 (1992). Such a decision will not be overturned on review without a clear showing of substantial

prejudice. *Id*. *citing*, State v. Young, 125 Wn.2d 688, 691, 888 P.2d 142 (1995).

In this case, Hammock offered no information that would support the trial court appointing an expert witness. Hammock only requested an expert on diminished capacity but provided no details of why such an expert would be necessary for his defense. The trial court properly found that "There's no basis in the record that I'm aware of that would support such a defense or a mitigating factor such that the court would appoint an expert to explore it." RP 14. The trial court's decision to not appoint an expert was not an abuse of discretion.

Nothing in the record demonstrates a clear showing of substantial prejudice. In fact, the trial court recounted reasons why a new expert would not be necessary for the resentencing hearing by noting that the record of proceedings for this case demonstrated that Hammock had been evaluated for diminished capacity by Western State Hospital and had a defense expert appointed at State's expense prior to trial. RP 13-14.

Presumably, Hammock could have relied on those evaluations to support any claimed mitigating factors if any evidence existed that would support such a claim.

Hammock made no showing that a new expert on diminished capacity was necessary for the presentation of his sentencing recommendation or even that such an expert had a potential to provide mitigating evidence. The trial court's denial of Hammock's request to appoint an expert was not erroneous.

Hammock's argument that the trial court refused to consider mitigating evidence misconstrues what actually occurred at the resentencing hearing. Hammock offered no mitigating evidence. The defense strategically argued that the trial court should follow the lead of the original sentencing court and impose the high end of the standard range, providing Hammock the benefit of a 55-month reduction following the Blake decision. The trial court followed the defense recommendation.

Hammock's citation to In re Personal Restraint of Adams, 178 Wn.2d 417, 420, 309 P.3d 451 (2013), for the proposition that even if a defendant did not present a diminished capacity defense at trial, they may still retain an expert at sentencing to pursue mitigating evidence is misplaced. In Adams, the defendant hired a named expert and presented evidence of diminished capacity in support of a request for an exceptional sentence downward. *Id*. That was not the issue in the personal restraint petition and there was no discussion regarding the defendant's burden of demonstrating necessity for an expert to be appointed by the Court. The actual issue in the case was whether the facial invalidity of an incorrect offender score permitted an exception to the one-year time bar of a PRP, thus allowing him to raise an ineffective assistance of counsel claim for failure to investigate and develop a diminished capacity defense at trial. The Court held that once the one-year time limit has run, a petitioner may seek relief only for the defect that renders the judgment not valid on its face (or one of

the exceptions listed in RCW 10.73.100). *Id*. at 426-427. The decision does not support Hammock's claim that the trial court erred by failing to appoint an expert witness for re-sentencing.

State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993) is closer to the situation here. In Barberio, the trial court imposed an exceptional sentence which the defendant did not appeal. *Id.* at 49. Later, the Court of Appeals affirmed a second-degree rape conviction, but reversed a third-degree rape conviction. *Id.* The State chose not to retry the reversed charge. *Id.* At resentencing, the defendant challenged the aggravating factors found by the court in the initial sentencing. *Id.* The trial court resentenced Barberio to the same exceptional sentence. *Id.* at 49-50. Barbiero again appealed the exceptional sentence, but the Court of Appeals granted the State's motion to dismiss those issues because the defendant had not challenged the exceptional sentence in the first appeal. *Id.* at 50. The trial court emphasized nothing had changed in regard to new evidence or the impact of the Court of Appeals opinion that

merited reexamination of Barberio's sentence. *Id.* at 51–52. In resentencing Barberio to the same exceptional sentence, our State Supreme Court held that the trial court made "only corrective changes in the amended judgment and sentence." *Id.* at 51.

While Blake created a facial invalidity in Hammock's offender score, the resentencing was much like that in Barbiero where the trial court made corrective changes in the amended judgment and sentence. Hammock offered no evidence to support the appointment of an expert witness for resentencing, nor did he actually request an exceptional sentence. The trial court properly considered the issues and imposed a standard range sentence. A sentence within the standard range is generally not appealable. State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). Hammock failed to demonstrate that his request for an expert was necessary to his sentencing recommendation and the trial court properly considered the recommendations of both the State and Hammock in imposing

a standard range sentence. Hammock cannot demonstrate error and he is not entitled to be resentenced.

4. Hammock failed to preserve a motion for new counsel for appeal; however, if the issue was preserved, the trial court conducted an adequate inquiry into Hammock's allegations of ineffective assistance of counsel.

Hammock never requested that the trial court appoint new counsel. While he informed the trial court that he had concerns about the effectiveness of counsel he never explicitly requested new counsel. Generally, a reviewing Court will not consider an evidentiary issue that is raised for the first time on appeal because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3). Where Hammock merely requested inquiry into whether his counsel was providing effective assistance of counsel, he did not adequately preserve the issue of whether the trial court should grant new counsel for appeal. As such, this Court should not consider his claim that the trial court erred by failing to consider his claim of irreconcilable conflict.

Even if Hammock had preserved a claim for newly appointed counsel, he failed to establish facts demonstrating good cause for substitution. "A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate." State v. Stenson, 132 Wash.2d 668, 733, 940 P.2d 1239 (1997 (citing State v. DeWeese, 117 Wash.2d 369, 375–76, 816 P.2d 1 (1991)). A defendant who wishes to substitute appointed counsel must move before the trial court and show good cause for the substitution, " 'such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.'" State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting Stenson, 132 Wn.2d at 734). A defendant's general loss of confidence in defense counsel by itself is not sufficient cause for substitution. Stenson, at 733-34 (citing Johnston v. State, 497 S.2d 863, 868 (Fla.1986)). "A disagreement over defense theories and trial strategy does not by itself constitute an irreconcilable conflict entitling the

defendant to substitute counsel because decisions on those matters are properly entrusted to defense counsel, not the defendant." State v. Thompson, 169 Wn. App. 436, 459, 290 P.3d 996 (2012).

A trial court's denial of a motion for substitute counsel is reviewed for an abuse of discretion. Varga, at 200. When reviewing such a decision, the Court considers the (1) extent of any conflict, (2) the adequacy of the trial court's inquiry and (3) the timeliness of the motion. State v. Cross, 156 Wn.2d 580, 607, 132 P. 3d 80 (2006).

In examining the extent of the conflict, this Court considers the extent and nature of the breakdown in the relationship and its effect on the representation actually presented. State v. Schaller, 143 Wn. App. 258, 270, 177 P.3d 1139, 1146 (2007). In State v. Waller, the Court found there was no conflict that jeopardized presentation of defense even when communication had become infrequent, because communication had not broken down entirely as lines of

communication between attorney and client remained open and available. State v. Waller 195 Wn. App. 1036, 2016 Wash.App.LEXIS 1899, 2016 WL 4248742 *3, (Div. II 2016) *review denied*, 187 Wn.2d 1004, 386 P.3d 10 (2017).[3] In State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), the Court found no irreconcilable conflict where the defendant sought substitution of counsel because his attorney refused to pursue a defense that was unsupported by the facts.

In examining whether a trial court conducted an adequate inquiry on a motion for substitute counsel, the defendant must at least state the reasons for his dissatisfaction with counsel, and the record on appeal must show that the trial court had before it the information necessary to assess the merits of the defendant's request. Waller, No. 45939-6-II, *3 (citing State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007); See Stenson, at 737 (holding that the trial court's denial of new court appointed counsel was not abuse of discretion given that

[3] Unpublished opinion offered under GR 14.1.

he considered the defendant's complaints and evaluated counsel's performance)). This may, but need not, be a formal inquiry. Schaller, at 271.

Here, the facts do not support a request for substitute counsel. There was no complete breakdown in communication or irreconcilable conflict. The trial judge explained "Mr. Blair did advocate for the court to appoint an expert as requested by Mr. Hammock. The lack of an offer of proof is not proof of deficient performance by Mr. Blair, he's simply aware of the evidence surrounding the issues of diminished capacity based upon the handling of the case before the trial." RP 14-15.

Additionally, the defendant stated, per the letter, the reasons for his dissatisfaction with his counsel and the trial court considered the record and addressed those concerns. Thus, even though there was no official motion, the trial court sufficiently considered Hammock's complaints and did not abuse its discretion by not taking further action. As the trial court noted, Mr. Blair did make Mr. Hammock's request for an

expert, but Mr. Blair was also "aware of the evidence surrounding the issues of diminished capacity based upon the handling of the case before trial." RP 15. Nothing in the record supports Hammock's allegation of ineffective assistance of counsel. There was no basis for the trial court to take further action with regard to Hammock's letter to the court.

5. Hammock's claim that Mr. Blair was providing ineffective assistance of counsel failed to demonstrate either deficient performance or prejudice.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61,

77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing Court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, at 696-697. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation. Strickland v. Washington, 466 U.S. 668, 687,

104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Here the record demonstrates that Mr. Blair made a request for an expert for sentencing, despite the fact that the motion was unsupported by any facts. Mr. Blair was aware of the history of the case, including the prior evaluations and acted strategically in making a reasonable and appropriate recommendation to the trial court that resulted in a 55-month reduction in Hammock's sentence.

It was clear in the record that Blair was communicating with Mr. Hammock and was addressing areas that Mr. Hammock expressed concern about such as the same course of conduct in Hammock's prior Thurston County convictions. RP 5, 19. Hammock's claim that Blair was rendering ineffective assistance of counsel is entirely unsupported by the record. "Bald assertions of ineffective assistance of counsel do not entitle" a defendant to an evidentiary hearing. Jones v. Gomez,

66 F.3d 199, 205 (9th Cir. 1995). Put another way, "An evidentiary hearing to resolve a claim of ineffective assistance of counsel is not necessary when the existing record is adequate to dispose of the claim." State v. Garcia, 57 Wn. App. 927, 928, 791 P.3d 244, 246 (1990).

Moreover, for the same reasons that the trial court properly denied the request for appointment of an expert, Hammock cannot demonstrate any prejudice from Blair's performance. Nothing in the record suggests that different actions by Mr. Blair would have resulted in mitigating evidence being presented that would have changed the outcome. The trial court properly concluded that Mr. Blair's representation was not ineffective.

6. The appearance of fairness doctrine does not require a new judge on remand.

For all of the reasons stated above, Mr. Hammock is not entitled to a resentencing hearing. However, the State has conceded that the matter should be remanded for further inquiry

into Mr. Hammock's ability to pay discretionary attorney fees. Hammock requests that this Court require that any issues on remand be heard by a different trial judge based on the appearance of fairness doctrine. The record does not show that the trial court in this case violated the appearance of fairness and the State requests that this Court deny Hammock's request to mandate a new trial judge.

Washington's "appearance of fairness doctrine seeks to ensure public confidence by preventing a biased or potentially interested judge from ruling on a case." In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). A claimed violation of appearance of fairness is reviewed in two stages, first, the party alleging bias "must support the claim with evidence of the trial court's actual or potential bias" sufficient to overcome the presumption that the trial court performed its functions regularly and properly without bias or prejudice." West v. Wash. Ass'n of County Officials, 162 Wn. App. 120, 136-137, 252 P.3d 406 (2011). If the party makes

that showing, a reviewing Court then considers whether "a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial and neutral hearing." Meredith, at 903, citing, State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). If the appearance of fairness doctrine is violated, this Court may order that a cause be assigned to a different judge on remand. State v. A.W., 181 Wn. App. 400, 414, 326 P.3d 737 (2014).

Here, Hammock fails to overcome the presumption that the trial court performed impartially. The record shows that the trial court asked the parties questions regarding the offender score calculations, appropriately reviewed the historical record of this case, and properly considered the issues before it. Resentencing of complex cases such as this one based on State v. Blake is difficult and complicated. The impact of the decision on finality of victim cases such as this one cannot be understated.

With those complex dynamics, the record demonstrates that the trial court properly and impartially considered the issues. The trial court asked questions about the calculation of the offender score and allowed the parties time to discuss and research the appropriate offender score before accepting the parties' agreement that the new offender score on the homicide would be 8. Ultimately, the trial court adopted the recommendation of the defense and imposed a sentence 55 months shorter than Hammock had previously faced.

Despite the fact that it was clear that Hammock was attempting to utilize Blake as an opportunity to seek a vastly different sentence than he had previously received, the trial court properly considered Hammock's request for appointment of an expert witness, which was unsupported by anything in the record. The trial court also properly considered the existing record in this case, including the fact that Hammock had been evaluated for diminished capacity prior to trial and had been

appointed an expert on those issues at State's expense previously.

It was appropriate to question the offender score calculation of Hammock's Thurston County stolen property counts because the original sentencing court in this case counted them as same criminal conduct, but the judgment and sentence from Thurston County scored them against each other. CP 118-119. Despite only three prior felony convictions, the Thurston County Superior Court scored each count with an offender score of 4. CP 118-119. There was no indication that Hammock was on community custody at the time of the offenses listed in the judgment and sentence and no indication that current offenses constituted same criminal conduct. CP 118-119. Thus, despite the fact that the original sentencing judge in this case counted the offenses as one, there was reason for the trial court to inquire at resentencing regarding whether or not that was correct. Ultimately, when the prosecutor

indicated that the State would not ask to revisit the issue, the trial court properly accepted the State concession. RP 15-16.

This case is not comparable to the cases cited in which the appearance of fairness doctrine was applied. In State v. Ra, 144 Wn. App. 688, 705, 175 P.3d 609 (2008), the trial court referred to the defendant as "some distorted character who breeds and lives violently," and proposed theories for the State to use to admit improper evidence. Here, the trial court merely asked questions of the parties and was polite to all parties including Mr. Hammock.

In City of Seattle v. Clewis, 159 Wn .App. 842, 851, 247 P.3d 449 (2011), the trial judge, on its own, ordered the prosecution to seek a material witness warrant in contrast to a court rule that placed the decision to seek a material witness warrant on the prosecution. Division I of this Court stopped short of concluding that the appearance of fairness was violated because the judge later recused himself, and "assuming the judge did create the appearance of bias against Clewis by

advocating steps the prosecutor should take to keep the case alive, the remedy would be recusal." *Id*. at 851.

In this case, the trial court did not show personal animus against any party, *e.g.*, In re Custody of R, 88 Wn. App. 746, 762-63, 947 P.2d 745 (1997), did not demonstrate personal bias or a conflict of interest, *e.g.* Tathan v. Rogers, 170 Wn. App. 76, 103, 283 P.3d 583 (2012), and did not impermissibly exercise its authority in any way, *e.g.* State v. A.W., at 411-12. The fact that the trial court cited its own experience does not indicate bias or prejudice and the fact that the trial court was formerly a prosecutor is insufficient to show a violation of the appearance of fairness. In re Pers. Rest. of Swenson, 158 Wn. App. 812, 819, 244 P.3d 959 (2010); State v. Dominguez, 81 Wn. App. 325, 327, 914 P.2d 141 (1996).

Finality of judgments is an important aspect of the criminal justice system. In re Pers. Restraint of Kennedy, ___Wn.2d __; ___P.3d ___ (July 28, 2022); Slip Op. No. 99748-9, at 12. The fact that the trial court erred on the side of

the defendant in choosing not to impose an exceptional sentence while considering the possible effects on finality does not implicate the appearance of fairness. It is a legitimate concern of a trial court to avoid potential issues that could result in a decision being reconsidered or overturned. Hammock's claim that the trial court violated the appearance of fairness doctrine is without merit.

Hammock has neither demonstrated actual or potential bias that overcomes the presumption of impartiality nor demonstrated that a reasonably prudent and disinterested person would conclude that all parties did not obtain a fair, impartial, and neutral hearing. This Court should not require that any issues on remand be heard by a different judicial officer.

D. CONCLUSION

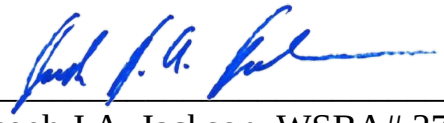
Gordon Hammock properly received the benefit of a reduced offender score following our State Supreme Court's decision in State v. Blake. He did not demonstrate that a court appointed diminished capacity expert was necessary for the

resentencing hearing. This is especially true where the he had been evaluated and had the benefit of a court appointed expert prior to trial. The trial court did not err by denying his request for a new expert. The State concedes that the inquiry into Hammocks ability to pay attorney's fees was insufficient in light of RCW 10.101.010. The State does not oppose remand for the sole purpose of conducting a proper inquiry into Hammock's ability to pay or to strike the attorney's fees based on indigency. Hammock did not ask for substitute counsel and his letter stating concerns that his counsel was rendering ineffective assistance of counsel was unsupported by the record. Hammock has not demonstrated any reason why he should receive yet another sentencing hearing.

The record does not support Hammock's claim that the trial court violated the appearance of fairness doctrine. The State respectfully requests that this Court affirm the standard range sentence and remand solely for the purpose of addressing the discretionary legal financial obligations.

I certify that this document contains 7229 words, not including those portions exempted from the word count, as counted by word processing software, in compliance with RAP 18.17.

Respectfully submitted this 1st day of August 2022.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: August 1, 2022.

Signature: Stephanie Johnson

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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